

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
February 16, 2019

Parents, on behalf of Student,¹)	
Petitioners,)	
)	
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2018-0268
District of Columbia Public Schools and)	
Office of the State Superintendent of)	
Education,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by the Petitioners, who are the parents of the student (the “Student”). A Due Process Complaint (“Complaint”) was received by the District of Columbia Public Schools (“DCPS”) and Office of the State Superintendent of Education (“OSSE”) (collectively, the “Respondents”) on October 17, 2018. A response was filed by DCPS on October 26, 2018. A response was filed by OSSE on October 29, 2018. The resolution period ended on November 15, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title

¹ Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

After a prehearing conference was held on November 2, 2018, a prehearing order was submitted on November 8, 2018, describing the issues in the case. Subsequent to the prehearing order, on November 13, 2018, Petitioners sought to add allegations that had not appeared in the original Complaint. Accordingly, Petitioners filed an amended Complaint on November 15, 2018, which this Hearing Officer authorized by an order issued on November 24, 2018. OSSE submitted a response to the amended Complaint on November 21, 2018. DCPS submitted a response to the amended Complaint on November 27, 2018. Another prehearing conference was held on January 3, 2019. A second prehearing order was issued on January 11, 2019, again describing the issues in the case, including the issues raised in the amended Complaint.

DCPS moved to dismiss the amended Complaint on January 11, 2019. Petitioners filed opposition to the motion on January 17, 2019. OSSE also filed opposition to the motion on January 17, 2019. The motion was denied by an order issued on February 4, 2019.

On January 17, 2019, Petitioners moved, on consent, to extend the timeline for the Hearing Officer Determination (“HOD”) because of witness availability and other factors. An interim order granting this motion extended the deadline for the HOD to February 16, 2019.

There were two hearing dates: February 5, 2019, and February 6, 2019. These were closed proceedings. Petitioners were represented by Attorney A, Esq. DCPS was

represented by Attorney B, Esq. OSSE was represented by Attorney C, Esq. Petitioners moved into evidence exhibits 1-36. There were no objections. Exhibits 1-36 were admitted. DCPS moved into evidence exhibits 1-3. There were no objections. Exhibits 1-3 were admitted. OSSE moved into evidence exhibits 1-15. There were no objections. Exhibits 1-15 were admitted. Petitioners presented as witnesses: Witness A, a consultant; Witness B, a pediatrician; Witness E, a behavior specialist at School D; and the Student's mother. DCPS presented as a witness: Witness C, the Special Education Coordinator and Local Educational Agency ("LEA") Representative at School B. OSSE presented as a witness: Witness D, a special programs manager.

After Petitioners' initial presentation, DCPS moved for dismissal on the record, which motion was denied. At the close of testimony, the parties presented oral closing statements. The parties were given an opportunity to present a list of authorities after the hearing concluded. The parties filed lists of authorities on February 11, 2019.

IV. Issue

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issue to be determined in this case is as follows:

Did Respondents fail to provide the Student with an appropriate school/location/placement for the 2018-2019 school year? If so, did Respondents deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioners contended that School C, the school proposed for the Student by Respondents, would not provide the Student with enough challenges, and that, specifically, the school's student population and curriculum would be inappropriate given the Student's cognitive ability and "unique circumstances." Petitioners argued that

School C does not appropriately address the actions of its student population, fails to “shape” the behavior of misbehaving students, and fails to individualize student behavior plans. Petitioners contended that, as a result, the school is not equipped to handle the Student’s challenging behaviors. Petitioners also asserted that instruction at School C is not sufficiently differentiated, that the Student requires the “TEACCH” and Applied Behavioral Analysis (“ABA”) methodologies, and that the school has insufficient sensory interventions for the Student, in particular a lack of a sensory room. Petitioners therefore seek placement at School D, with all related expenses.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Autism. The Student has been diagnosed with Autism Spectrum Disorder (“ASD”), Attention Deficit Hyperactivity Disorder (“ADHD”), and Anxiety Disorder, and has a history of difficulty engaging with peers and adults in a developmentally and socially appropriate way. The Student can make “reasonable” eye contact but has issues with communication. When an interaction does not go as the Student expects, or when s/he is confronted with a social or academic challenge that s/he feels s/he cannot meet, or if s/he experiences “sensory overload,” s/he can become overwhelmed and resort to behaviors that are dangerous or destructive. Such behaviors have occurred on the playground as well as in more structured environments. The Student tends to function better in the home environment. P-3; P-5-2; Testimony of Witness A; Testimony of Witness B.

2. Intellectually, the Student scores in the high average range, with a Full-Scale IQ of 123 on the Kaufman Brief Intelligence Test. The Student’s mathematics

skills are considered average, though learning new procedures and problem-solving can be challenging for him/her. The Student's reading skills are considered to be grade appropriate, though the Student was reported to be behind in math during the third term of the 2017-2018 school year. P-3-8, 18; P-5-5-7.

3. During the 2015-2016 school year, the Student attended School A in a pre-kindergarten setting. The Student had difficulty with instruction at School A, where s/he eloped and had other difficulties. As a result, the Student was determined to be eligible for services as a student with a Developmental Disability. The Student needed sensory interventions to regulate his/her behavior during this year. Testimony of mother; Testimony of Witness A; P-3-2.

4. For the 2016-2017 school year, the Student attended School B. The Student responded well to his/her teacher and aide, and the Student made gains in all domains. The Student showed a willingness to complete tasks that s/he previously avoided. The Student's behavior improved significantly during this school year. The Student made progress in the ability to express him/herself, refrained from defiant behavior, and benefitted from direct intervention and consequences when engaged in inappropriate behaviors. The Student also benefitted from adult modeling, support, and sensory input. Even so, the Student experienced a significant amount of emotional stress during the school year, as reflected by a "Strength and Difficulties Questionnaire" administered by school staff. Testimony of mother; Testimony of Witness A; Testimony of Witness B; P-3-2-3; P-2-4.

5. An Individualized Education Program ("IEP") was written for the Student on May 22, 2017. The IEP contained goals in adaptive/daily living skills, emotional,

social and behavioral development, and motor skills/physical development. The IEP recommended five hours per week of specialized instruction inside general education, 240 minutes per month of occupational therapy outside general education, and 120 minutes per month of behavioral support services (sixty minutes inside general education and sixty minutes outside general education). The IEP indicated that the Student had difficulty with transitions, group activities, and following directions, and that the Student benefitted from the use of a visual schedule and sensory breaks throughout the school day. This IEP required a dedicated aide for the Student. P-2.

6. The Student continued at School B for the following school year, 2017-2018, but the Student began to have significant difficulty in school, especially with anxiety. The Student had a different aide at the start of the year, and this aide did not work well with the Student. The school tried other aides, but none of them helped the Student make gains. The Student had difficulty attending to tasks, avoided activities that required effort, fidgeted in his/her seat, interrupted others, talked too much, and had difficulty waiting his/her turn. The Student could also be rude in class, make threats, be physically aggressive, and express a troubling interest in guns. Sometimes the Student's behaviors appeared to have a cause, but other times the behaviors seemed to come from "inside." School B provided the Student with a "token board" and a "reinforcer" every five to ten minutes after the Student misbehaved. The Student's teacher also sometimes asked him/her to leave the room when s/he exhibited inappropriate behavior. However, these interventions did not improve the Student's behaviors. Testimony of Witness B; Testimony of Witness C; P-3.

7. DCPS proposed evaluating the Student, but Petitioners wanted to conduct their own assessment and retained Witness B, a behavioral and developmental pediatrician. A Behavior Assessment System for Children-3 (“BASC-3”) test, administered by Witness B, revealed that the Student had “extremely elevated” scores in attentional control, emotional control, and behavioral control. After additional testing and interviews with the Student’s teachers and parents, Witness B concluded that the Student needs a school environment which is highly structured, small, and designed for students with ASD. Witness B recommended evidence-based, specialized teaching methods and behavioral strategies such as pivotal response training, TEACCH-based programming, behavioral intervention programming, visual supports, supported transitions, and “social learning support.” Witness B concluded that the Student should have an “integrated system of positive behavior supports,” including a specific program for reinforcing appropriate coping, social and learning behaviors; continued use of immediate tangible reinforcers for positive behaviors; and demands for adaptive/coping behaviors when the Student was challenged by non-preferred activities or demands for flexibility. Witness B also felt that the Student’s special education program must include classmates with similar language and cognitive profiles. Witness B’s report indicated that Petitioners told Witness B that they were concerned with the Student’s academic skills and thought that the Student might have a learning disability. This evaluation was sent to DCPS in June, 2018. P-3; Testimony of Witness B; Testimony of mother.

8. An IEP meeting was held for the Student on June 4, 2018. At this meeting, the parties agreed that the Student needed more services, and recommended a

placement outside general education for six hours per day. The IEP included more areas of concern and more goals, including in mathematics; reading; written expression; adaptive living skills; emotional, social and behavioral development; and motor skills/physical development. The IEP also recommended 240 minutes per month of behavioral support services outside general education, 240 minutes per month of occupational therapy outside general education, and a dedicated aide. The IEP was written collaboratively with Petitioners and Petitioners' expert, Witness A. Petitioners agreed with the entirety of the IEP, including the goals. Testimony of mother; Testimony of Witness A; Testimony of Witness C; P-5.

9. Petitioners and DCPS agreed to place the Student in a therapeutic, non-public day school. OSSE conducted a placement meeting in July, 2018. Petitioners wanted the Student to attend School D, but OSSE would not consider this school because it does not have a "Certificate of Approval" from OSSE. A number of schools that did have a "Certificate of Approval" were considered, and packages of materials were sent to several such schools. One of these schools, School C, accepted the Student. Petitioners felt that OSSE unreasonably excluded School D from consideration and were not receptive to the proposition that the Student attend School C. Testimony of Witness D; Testimony of Witness C; Testimony of mother; P-7; R-1-18.

10. The Student's mother observed School C on August 1, 2018. She was concerned about seeing children in the hall who were not speaking and/or being led by the hand. In the classroom that the Student's mother observed, most of the children were wearing headphones and viewing materials. The children seemed "different" to her. The

Student's mother also talked to the principal of the school. The Student's mother concluded that the school was not a good fit for the Student. Testimony of mother.

11. School C's brochure indicates that it accepts students with anger issues, aggressiveness issues, withdrawal issues, and issues with suicidal thoughts or actions, as well as a range of other students. The school also works with students who maintain unhealthy relationships with peers or adults. The brochure indicates that the school teaches pursuant to the Maryland Common Core Standards, and that instruction includes "character education" and formalized plans to improve behaviors and lagging cognitive skills. P-10.

12. School C provides small, self-contained special education classes and uses the "Zones of Regulation" program, which assists students with recognizing their moods and feelings so they can access strategies to cope with various feelings in a positive manner. The school employs the Positive Behavior Interventions and Supports ("PBIS") approach to behavioral intervention, which gives students different incentives to learn and provides them, if necessary, with a "check in/check out program" and/or mentors. The classroom proposed for the Student at School C would contain students who are at the Student's approximate academic level, students whose linguistic abilities are average or above average, and one student who receives speech/language services to assist with expressive language skills. The school uses the TEACCH methodology to provide students with visual supports, structure, and behavioral interventions. The school's "visual communication specialist" provides support and resources to ensure that the school's TEACCH program is implemented in consideration of each student's goals and learning styles. School C also has counselors and behavior technicians on staff.

Testimony of Witness A; Testimony of Witness C; Testimony of Witness D; P-26-7-12; P-16-3-4; P-14.

13. Witness A, Witness C, School B staff, and OSSE staff visited School C on November 6, 2018. Witness C felt that the school was appropriate for the Student, but Witness A believed that the school was inappropriate because, among other things, she felt that the school did not provide the students with enough challenges; did not provide effective interventions to “shape” the behavior of misbehaving students; failed to individualize student behavior plans; did not differentiate instruction; did not offer ABA instruction; and did not offer sufficient sensory interventions. Testimony of Witness A; Testimony of Witness C.

14. Petitioners enrolled the Student at School D for the 2018-2019 school year. School D is a private school that works with high-functioning autistic students, as well as students with executive functioning issues, ADHD, and children who have no diagnosis but are “socially awkward.” There are a total of fifty-six children in the school, ranging from kindergarten through eighth grade. Each classroom has a lead teacher and an instructional assistant, and the school has a behavioral specialist and a social learning specialist on site. There are six children in the Student’s classroom, all of whom are functioning at about grade level in reading and math. “One or two” of these students has been diagnosed with ASD, and the other students have been diagnosed with ADHD. Testimony of Witness E.

15. When the Student first started at School D, s/he was successful, but when the “honeymoon period” ended, the Student’s negative behaviors began to recur. The Student engaged in verbally inappropriate behavior, hitting, property destruction, and

aggression, requiring the Student to be removed from the classroom on occasion. By December, 2018, the school changed its approach to the Student's behavior. For instance, when the Student became especially upset, the school kept the Student in the classroom and removed the other students. The new approaches led to some improvement in the Student's behavior. The school also employed ABA methodology, which involves, among other things, the use of positive reinforcers to modify behavior and data to determine a student's behaviors over time. The school then uses that data to adjust a student's behavior program. Overall at School D, the combination of smaller class size, similar peers, and the "consistency" of adults contributed to the Student feeling safe. Testimony of Witness E; P-26.

VI. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

See D.C. Code § 38-2571.03(6)(A)(i).

Since this case is about the appropriateness of the Student's educational placement, the burden of persuasion is on DCPS and OSSE, provided that a prima facie case is presented by Petitioners. It is noted that an educational placement includes a school or a "location of services." Eley v. District of Columbia, 47 F. Supp. 3d 1, 16 (D.D.C. 2014).

Did Respondents fail to provide the Student with an appropriate school/location/placement for the 2018-2019 school year? If so, did Respondents deny the Student a FAPE?

Petitioners contended that School C, the school proposed for the Student by Respondents, would not provide the Student with enough challenges, and that, specifically, the school's student population and curriculum would be inappropriate given the Student's cognitive ability and "unique circumstances." Petitioners also argued that School C would not appropriately address the actions of its student population, fails to "shape" the behavior of misbehaving students, and fails to individualize student behavior plans. Petitioners also contended that instruction at the school is not sufficiently differentiated, that the school does not provide the Student with the ABA methodology s/he needs, and that there are insufficient sensory interventions at the school.

Most cases involving FAPE denial focus on a student's IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). As explained in Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), an IEP must be reasonably calculated to enable the child to receive benefit. More recently, the United States Supreme Court explained that the Rowley standard is "markedly more demanding than the 'merely more than *de minimis*' test" applied by many courts. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988, 1000 (2017).

Accordingly, the vast majority of reported cases involving claims of FAPE denial relate to allegedly inappropriate IEPs. Nevertheless, there is authority to bring certain claims against school districts relating solely to the appropriateness of an assigned school, even if the IEP is appropriate. Petitioners may bring claims where they learn that the school will not be able to implement the IEP. D.C. ex rel. E.B. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 509 (S.D.N.Y. 2013) (placement offer denied student a FAPE because an employee of the school during the parent visit indicated to the parent that that the school could not address student's seafood allergy as per IEP requirements). There is also authority allowing parents to bring claims against a school district where the proposed school is not reasonably calculated for the student. In Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004), the court found a denial of FAPE because the proposed school would subject the student to continued bullying due to perceived effeminacy. In Gellert v. District of Columbia, 435 F. Supp. 2d 18 (D.D.C. 2006), DCPS failed to show that the assigned school was calm, with a small class size, as the student required. In Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988), the school assignment was inappropriate because it involved a mid-year transfer that would have been disruptive to the student.

In August, 2018, the Student's mother observed School C. She was concerned about seeing children in the hall who were not speaking and/or being led by the hand. In the classroom she observed, the children were wearing headphones and viewing materials without interacting with each other. The children seemed "different" to the Student's mother. After the Student was offered a seat at School C, Petitioners declined the placement, feeling that the school would not provide the Student with enough challenges,

and that the school's student population and curriculum were inappropriate given the Student's cognitive ability and unique circumstances.

However, Witness A, Witness C, and Witness D testified that during their observation at School C in November, 2018, they were told that the children in the classroom proposed for the Student were functioning at or near grade level, quite like the Student. There is no evidence in the record that the students in the proposed classroom were functioning at an inappropriate level for the Student. Nor is there any evidence in the record that School C would not provide enough academic challenges for the Student. It is noted that, while the Student's IQ is well above average, the Student's most recent IEP did not indicate that the Student was above grade level in any academic subject. In fact, Petitioners told Witness B that they were concerned with the Student's academic skills and that the Student might have a learning disability.

Petitioners' claims are also premised on Witness A's observation of School C in November, 2018. Witness A's main point here was that the Student required ABA instruction to shape behavior, noting that ABA not only provides positive reinforcers to modify behavior, it also uses behavioral data to adjust a student's behavioral plan. Witness A stressed that the Student needed an individual behavior plan, and that she did not see any evidence of such behavioral plans at School C during her observation.

However, Witness B's evaluation report, which was sent to DCPS before the IEP meeting in June, 2018, did not state that the Student *must* have ABA instruction to be educated. Rather, ABA was just one of the interventions Witness B suggested for the Student. Witness B's report indicated that the Student's classroom should incorporate evidence-based teaching methods for children with ASD, such as "principles of ABA-

PRT and TEACCH, use of visuals, support for transitions and flexibility [and] social teaching strategies.” Witness B also recommended an “integrated system of positive behavior supports” for the Student, including a specific program for reinforcing appropriate coping, social, and learning behaviors.

Furthermore, School C does appear to use the TEACCH² methodology, as Witness B recommended in her report. And Witness B testified that TEACCH provides visual structure, opportunities for a child to get immediate reinforcement for appropriate behaviors, and, in some settings, incentive programs. Although Witness A indicated that she did not see evidence of TEACCH being used during the observation of School C in November, 2018, and although her observation report stated that school staff told her that the school had not yet implemented TEACCH in every classroom, Witness C testified that the School C representative *did* show Witness A examples of TEACCH being used in the classroom during the observation. The classroom proposed for the Student also uses PBIS, a behavior program that is also aligned with the recommendations in Witness B’s report.

Witness A contended that School C does not collect data, but Witness B did not mention the importance of data collection in her report. Witness A also contended that the PBIS system at School C would not be appropriate for the Student because its use suggested that School C did not individualize its behavior plans. However, Witness C specifically testified that students at School C can receive individualized behavior plans, and Witness A did not testify that she was told by any School C staff that the school would not write or implement individual behavior plans for students.

² At one point during testimony, Witness A indicated that the Student does not need TEACCH. Then, she said that the Student could benefit from some elements of TEACCH.

Witness A further argued that there was insufficient differentiation of instruction at School C, pointing out the math and art lessons she observed as examples. But this assertion is speculation based on a single observation. Moreover, Witness C said that she *did* see differentiation of instruction in the math class that both she and Witness A observed. In addition, without context or more information, it is difficult to know whether differentiation was appropriate or necessary during these lessons. It is also noted that this Hearing Officer is not aware of any case where the failure to differentiate instruction is the basis for a finding of FAPE denial.

Finally, Witness A testified that there were insufficient sensory interventions at School C, and the record does establish that the Student needs sensory interventions. In the prehearing order, Petitioners' main contention on this point was that School C does not have a sensory room. However, Witness A testified that the school *does* have a sensory room, though she was not allowed to see it because it was occupied by a student. Witness A's observation report asserted that School C's approach to sensory intervention is inappropriate because its sensory room could not be used as a preventative measure for the Student. However, Witness A's report also indicated that a student could use the sensory room as a preventative measure if that was required in the student's Behavior Intervention Plan. Further, Witness B's evaluation of the Student did not specifically require that s/he receive access to a sensory room as a preventative measure, and there is nothing in the record to suggest that Petitioners sought this intervention at the time the Student's IEP was created or at the time of the placement offer.

Petitioners also argued that DCPS and OSSE have the burden to show that the recommended placement was appropriate. However, Petitioners have the burden to

present a prima facie case first. Here, Petitioners' case was not compelling enough to satisfy this requirement, largely because Witness A's observation report and testimony came across as a post-hoc justification for Petitioners' unilateral decision to place the Student in School D.³ Moreover, even if Petitioners could be deemed to have met their burden to present a prima facie case, DCPS and OSSE have met their burden of persuasion to show that the proposed placement of the Student was appropriate and reasonably calculated. The record contains a significant amount of information about School C, including the school brochure, testimony on Witness C's observation of the school, and an email correspondence from the school's special education coordinator. Witness C affirmed that the Student's needs would be met at School C, which offers small classrooms, a culture that reinforces positive behavior and downplays negative aspects, and the opportunity for the Student to have direct behavior plans, counselors, and behavior technicians. In an email, School C's special education coordinator explained how the school individualizes behavior plans, noted that the linguistic levels of the students in the proposed class are average to above average, and confirmed that the school uses TEACCH systems through the school's visual communication specialist.

Ultimately, this case is about where parents prefer to place their child. However, parents are not entitled to the optimal placement of their child under the IDEA. K.S. v. D.C., 962 F. Supp. 2d 216, 225 (D.D.C. 2013) (the "Cadillac" of educational placement is not required). While Petitioners are to be praised for their keen concern for their child, and while their choice of placing the Student at School D was understandable, this

³ It is noted that at least one court has held that defects in placement are only actionable where they are "reasonably apparent" to the parent or the district at the time of the placement decision. E.A.M. v. New York City Dep't of Educ., No. 11 CIV. 3730 LAP, 2012 WL 4571794, at *11 (S.D.N.Y. Sept. 29, 2012).

Hearing Officer must find that DCPS and OSSE offered the Student a FAPE through a reasonably calculated IEP and a reasonably calculated school setting.

ORDER

For the foregoing reasons, Petitioners' amended Complaint is dismissed with prejudice.

Dated: February 16, 2019

Michael Lazan
Michael Lazan, Esq.
Hearing Officer

Copies to:

Petitioners' Representative: Attorney A, Esq.
DCPS's Representative: Attorney B, Esq.
OSSE Representative: Attorney C, Esq.
OSSE Office of Specialized Education
Office of Dispute Resolution

VII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: February 16, 2019

Michael Lazan
Impartial Hearing Officer